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IN THE

Supreme Court of the United States

October Term, 1962

MORRIS GOTTHILF,

Petitioner,

—against—

BENJAMIN SILLS, MORTON SILLS and SILLS OF CAMBRIDGE, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK SUPREME COURT, APPELLATE DIVISION, FIRST JUDICIAL DEPARTMENT

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PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK SUPREME COURT, APPELLATE DIVISION, FIRST JUDICIAL DEPARTMENT

The petitioner, Morris Gotthilf, prays that a writ of certiorari be issued to review the final order of the New York Supreme Court, Appellate Division, First Judicial Department, entered in the office of the Clerk of the Appellate Division on September 20, 1962, unanimously affirming, without opinion, an order of the Supreme Court, New York County, entered in the office of the Clerk of New York County on March 26, 1962.

Opinions Below

The New York Appellate Division, First Department, rendered no opinion. The Supreme Court, New York County, rendered two memorandum opinions, one on Febru-

ary 15, 1962, reproduced at Appendix I, *infra* pp. 16-17, and a second on March 14, 1962, reproduced in Appendix II, *infra* p. 17. These opinions are not reported.

Jurisdiction

The final order of the New York Appellate Division, First Department, was entered on September 20, 1962, reproduced as Appendix III, *infra* pp. 18-19. Thereafter the petitioner sought to appeal to the New York Court of Appeals as of right pursuant to §588(1)(a) of the New York Civil Practice Act on the ground that §764 of the Civil Practice Act as applied in the instant case violated the Fourteenth Amendment's due process clause. The respondents moved to dismiss the appeal. On November 1, 1962 the New York Court of Appeals granted the motion "upon the ground that the order sought to be appealed from does not finally determine the action within the meaning of the constitution." The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

Question Presented

Does §764 of the New York Civil Practice Act, providing for body execution, as applied in the instant case simply to enforce collection of a debt, violate the due process clause of the Fourteenth Amendment of the United States Constitution?

Constitutional and Statutory Provisions Involved

1. United States Constitution, Fourteenth Amendment, §1:

> "* * * nor shall any State deprive any person of life, liberty, or property, without due process of law; * * *."

2. New York Civil Practice Act, §764:

> "*Issuance of execution against the person generally.* Subject to the exception specified in the next section, an execution against the person of a judgment debtor may be issued by the court or a judge or justice thereof, upon application by the judgment creditor, in a case where the judgment can be enforced by execution, as prescribed by section five hundred and four of this act, and where the plaintiff's right to arrest the defendant depends upon the nature of the action. The issuance of the execution shall rest in the discretion of such court, judge or justice. The application for the issuance of the execution may be made without notice, or with such notice as the court, judge or justice may direct, and shall be made by affidavit which shall set forth in detail the right of the party to the execution, the amount of the judgment, the amount unpaid, and the time when and place where the execution against the judgment debtor's personal property has been returned wholly or partially unsatisfied."

3. New York Civil Practice Act, §504:

> "*Enforcement of judgment by execution.* In either of the following cases a final judgment may be enforced by execution:

"1. Where it is for a sum of money in favor of either party; or directs the payment of a sum of money. * * *"

4. New York Civil Practice Act, §826:

"*Right to arrest depending upon the nature of the action.* A defendant may be arrested in an action, as provided in this and the next article, where the action is brought for either of the following causes:

1. To recover a fine or penalty.

2. To recover damages for a personal injury.

3. To recover damages for an injury to property, including the wrongful taking, detention or conversion of personal property.

4. To recover damages for misconduct or neglect in office, or in a professional employment.

5. To recover damages for fraud, or deceit. * * *"

Statement of the Case

The respondents seek a body execution "pursuant to Article 44 and Sec. 826 of the Civil Practice Act" against the petitioner Morris Gotthilf on a final judgment which resulted from a mistaken default order. Mr. Justice Abraham J. Gellinoff by an order entered at the Office of the Clerk of the Supreme Court, New York County, on March 26, 1962 allowed in all respects the motion of the respondents for body execution. The Appellate Division, First Judicial Department, by an order entered in the office of the Clerk of that Department on September 20, 1962 affirmed Mr. Justic Gellinoff's order without opinion. The New York Court of Appeals on November 1, 1962 sustained a

motion of the respondents to dismiss the petitioners appeal to that Court "upon the ground that the order sought to be appealed from does not finally determine the action within the meaning of the constitution."

In June 1960 Benjamin Sills, Morton Sills and Sills of Cambridge, Inc., brought suit against Charge-It Systems, Inc., and Morris Gotthilf, alleging fraudulent representations on the part of the defendants to the damage of the corporate plaintiff. The defendants answered, denying any fraudulent representations on their part; and setting up affirmative defenses and counterclaims which charged fraudulent representations on the part of the plaintiffs to the damage of the corporate defendant.

On November 17, 1960 Mr. Justice Jacob Markowitz entered a default order against both defendants. When it was discovered that the default order was against the individual defendant Morris Gotthilf, as well as the corporate defendant Charge-It Systems, Inc., the then attorney for the defendants, Archibald Palmer, Esq., made a motion to set aside the default, but this motion was denied in an order which was filed on March 10, 1961.

On May 9, 1961 Mr. Justice George M. Carney ordered a judgment in favor of the corporate plaintiff and against the defendants in the sum of $17,408.77 together with interest and costs; and on May 24, 1961 the clerk entered judgment in the amount of $17,408.77 plus interest in the amount of $1,697.36 and costs and disbursements of $188.25 for a total of $19,294.38.

Thereafter Mr. Palmer unfortunately added to his first mistake a second error: he failed to specify in his notice of appeal to the Appellate Division, First Department, the

order of March 10, 1961 denying the motion to set aside the default order against the individual defendant Morris Gotthilf. The plaintiffs in their brief in the Appellate Division now made the point that "the individual defendant, Gotthilf, having failed to appeal from the order denying his motion to vacate his default, the appeal taken herein is unauthorized and in violation of Section 557 of the Civil Practice Act." The Appellate Division affirmed without opinion. 15 A.D. 2d 458 (1961).

The charges and countercharges in this case have been extreme. Despite them, however, certain facts which are undisputed nevertheless emerge. The plaintiff corporation and the defendant corporation entered into a factoring agreement under which the defendant corporation as factor made large advances to the plaintiff corporation. On September 22, 1959 there was due under this factoring arrangement from the corporate plaintiff to the corporate defendant the sum of $22,768.39, for which the corporate defendant held as collateral, accounts receivable of $28,319.28. The figure of $28,319.28 included accounts of doubtful and disputed collectibility amounting to some $23,000.00. The existence of this worthless collateral plus the threat that the plaintiff would go into bankruptcy, induced the corporate defendant to settle the amount of $22,768.39 due it for $13,000.00, thereby sustaining a loss of some $9,500.00.

It is equally clear that everything which the defendant Morris Gotthilf did, he did in his representative capacity as chairman of the board of the corporate defendant, Charge-It Systems, Inc. Moreover, there is no allegation in the instant complaint that the individual defendant Morris Gotthilf acted with malice or personally profited as a result of the alleged fraudulent acts. On the contrary,

the complaint makes plain that Morris Gotthilf acted only on behalf of the corporate defendant. For instance, the complaint alleges in paragraph Eighth that "the Corporate Defendant, acting through Gotthilf, entered into an agreement with plaintiffs". On such allegations the individual defendant should not have been held liable. See, for example, *Potter* v. *Minskoff*, 4 N. Y. 695 (1958), *affirming* 2 A.D. 2d 513 (4th Dept. 1956); *Matter of Brookside (Raybrook Textile Corp.)*, 276 App. Div. 357 (1st Dept. 1950); *Lukach* v. *Blair*, 108 Misc. 20 (Sup. Ct. N. Y. Co. 1919), *aff'd* 192 App. Div. 957 (1st Dept. 1920); *Hicks* v. *Haight*, 171 Misc. 151 (Sup. Ct. Nassau Co. 1939).

As to the default entered against both defendants, their then attorney, Mr. Palmer, swears that he thought he had an understanding with counsel for the plaintiffs that judgment would be entered against the corporate defendant only:

> "Prior to the scheduled time of the examination before trial of the defendants on October 27, 1960, deponent called the office of the attorney for the plaintiffs to obtain an adjournment of said examination due to his engagement in another matter at the scheduled time for the examination. Deponent was unable to reach plaintiffs' attorney at that time, and later in the morning deponent received a call from the office of plaintiffs' attorney and spoke to an individual whom he assumed to be Mr. Theodore Charnas. Deponent discussed the matter with said attorney and advised him that in view of the fact that the corporate defendant was insolvent and that it had been shown to said attorney that the individual defendant was not personally responsible, deponent would be willing to have judgment entered against the corporate defendant alone, and would thereupon

abandon the counterclaims interposed in the verified amended answer. It was deponent's understanding that said attorney agreed to this proposal and that the matter was to be disposed of in this manner.

"Deponent thereafter proceeded upon the assumption that the motions made by the attorney for the plaintiffs were based upon this agreement and that said attorney was merely proceeding to enter judgment against the corporate defendant. It was not until deponent was served with a copy of the order signed by the Hon. Aron Steuer granting judgment herein and setting down the matter for inquest on February 9, 1961, together with a notice of inquest which indicated that the plaintiffs were seeking execution against the person of the individual defendant herein, that deponent realized that plaintiffs' attorney had proceeded against the individual defendant as well as the corporation, contrary to his understanding with said attorney.

"Upon receiving these documents, deponent communicated with the attorney for the plaintiffs and inquired why said attorney had disregarded the agreement upon which deponent had permitted plaintiff's attorney to note a default in connection with the examination before trial originally scheduled for October 27, 1960. Deponent advised Mr. Theodore Charnas that in view of the fact that there were bona fide issues of fact involved in this action he could not possibly have consented to judgment against the individual defendant. Mr. Theodore Charnas replied that he had not personally handled the entry of the judgment herein and the proceedings subsequent thereto, and therefore was unable to answer deponent's inquiry. When deponent requested that Mr. Charnas vacate the judgment against the individual defendant, he was advised to make a motion for such relief.

"It appears from the order of the Honorable Jacob Markowitz dated November 16, 1960 that the plaintiffs' motion to strike the amended answer and counter-claims of defendants was granted upon the representation of the counsel for plaintiffs that the defendants' counsel informed him that defendants had abandoned this case. As hereinabove shown, this representation was, at the very least, based upon a misunderstanding on the part of plaintiffs' counsel with respect to the statements made to him by deponent on October 27, 1960, and it was never deponent's intention to abandon the defense of the action against the individual defendant herein. It is apparent that since deponent had prepared a verified answer in this proceeding which raised bona fide issues of fact, he could never have consented to the entry of a default judgment against the individual defendant. In this connection I call to the Court's attention, as I have indicated at the outset in this affidavit, that the defendant Morris Gotthilf was not individually liable for the acts alleged in the complaint. Everything that Morris Gotthilf did, he did in a representative capacity as chairman of the Board of Directors of the corporate defendant. Accordingly, any liability running to the plaintiffs was from the corporate defendant and not from the individual defendant Morris Gotthilf."

Thus it happened that Morris Gotthilf never had his day in court. If he had had his day, he could have shown not only that everything he did, he did in a representative capacity as chairman of the board of directors of the corporate defendant; but also demonstrated the worthlessness of the accounts receivable that served as collateral for the advances from the corporate defendant to the corporate plaintiff. He could have shown that the amounts which

were collected on this pretty worthless collateral after September 22, 1959 aggregated the grand and miserable total of but $3,663.02. The corporate defendant still ended up the loser to the extent of some $6,500.00.

Nevertheless, in his affidavit in opposition to the motion of the plaintiffs for body execution against him, Morris Gotthilf stood ready to cooperate with the court and offered to post bond in a reasonable amount to guarantee his presence and cooperation in any supplementary proceeding which the plaintiffs might wish to conduct.

Mr. Justice Gellinoff was not satisfied.

Morris Gotthilf filed an additional affidavit in which he stated:

> "2. I have no assets and the only income that I receive is from my business.
>
> "3. The net income (before taxes) which I received from my business for the past three years and in the current year to date is as follows:
>
> | | |
> |---|---|
> | 1962 to date ..... | $ 3,177.54 |
> | 1961 Loss ..... | (4,523.73) |
> | 1960 " ..... | 11,543.30 |
> | 1959 " ..... | 19,253.18 |
>
> * * * * *
>
> "5. Sometimes in the past I have had a successful refinancing which has brought me substantial income. I have some such transactions that I am working on now, but, like a lawyer with a case, I am not sure that they will be successful.
>
> "6. Concretely what I propose as a minimum is this: beginning March 1962 I will undertake to pay

to the plaintiffs 25% of my net income, payable monthly on the 5th day of the following month, that is, the first payment to begin on April 5, 1962 and to continue monthly thereafter.

"7. In conclusion I respectfully pray that the Court permit me to continue to try to earn all that I possibly can, for this will enable me to make payments against the judgment. I have no other means whatever of obtaining funds. If I should be incarcerated I will have to stay there, for I will then be through professionally and in the finance field where I now make most of my present limited income.

"8. My heart prompts me to add two further thoughts, and they both stem from the fear that I have not appealed to Your Honor's discretion despite the fact that I have offered to do a little more than I think I can. The first thought is that if my offer of 25% of my net income is not high enough in the Court's opinion then I will try to comply with what the Court suggests it ought to be if the Court will make such a suggestion. The second thought is this: if the Court does grant the motion for the issuance of a body execution then my life is through, finished, professionally and in every other way; and in addition to this intolerable condition, I shall also have the problem of trying to persuade my attorney O. John Rogge to appeal to the Appellate Division, First Department from such an order, for as long as there is life in me I will continue to refuse to believe that in this wonderful country of ours a man can not only be deprived of his day in court but also have to go to jail, and that in a civil and not a criminal case. I know not how else to say it."

But Mr. Justice Gellinoff was not to be appeased.

The petitioner argued before Mr. Justice Gellinoff that the court's application of §764 of the New York Civil Practice Act made this section violative of the due process clause of the Fourteenth Amendment to the United States Constitution. But Mr. Justice Gellinoff ruled otherwise, simply saying:

> "Section 764 of the Civil Practice Act is constitutional." (App. I, p. 16)

Reason for Granting the Writ

The New York Supreme Court in applying §764 of the New York Civil Practice Act, providing for body execution, simply to enforce the collection of a debt, made this section as applied violative of the due process clause of the Fourteenth Amendment to the United States Constitution.

Late in the last century, this Court began what has become an extended and expansive application of the due process clause of the Fourteenth Amendment. This development was a natural one, for it was in accord with the historical origin and role of due process clauses. Today in this country whenever a lawyer has a case in the state courts in which he feels that his client has not been given the consideration which our current standards of fairness and decency and our regard for the individual human being require, he turns to the due process clause of the Fourteenth Amendment. The writer traced this development in his recent volume *The First and the Fifth* (1960) 59-75.

In the first term after the appearance of the writer's volume, this Court set aside state court decisions in a dozen cases because of violations of the due process clause

of the Fourteenth Amendment. In *Culombe* v. *Connecticut*, 367 U. S. 568 (1961), *Peck* v. *Pate*, 367 U. S. 433 (1961), *Rogers* v. *Richmond*, 365 U. S. 534 (1961), and *Blackburn* v. *Alabama*, 361 U. S. 199 (1960), this Court set aside state court convictions because they involved forced confessions.

In *Ferguson* v. *Georgia*, 365 U. S. 570 (1961), *Reynolds* v. *Cochran*, 365 U. S. 525 (1961), and *McNeal* v. *Culver*, 365 U. S. 109 (1961), this Court set aside state court convictions because the defendants were deprived of the effective assistance of counsel.

In addition to these decisions, the like of which occur at almost every term, this Court held in *Smith* v. *Bennett*, 365 U. S. 708 (1961), that a state cannot make the writ of habeas corpus available only to prisoners who can pay the necessary filing fees; in *Irvin* v. *Dowd*, 366 U. S. 717 (1961), that Leslie Irvin had not had a fair trial because pre-trial publicity, which labelled him as the "mad dog killer", had prejudiced the jury against him; in *Torcaso* v. *Watkins*, 367 U. S. 488 (1961), that Maryland's requirement that a state officeholder declare his belief in God was invalid; in *Marcus* v. *Search Warrants*, 367 U. S. 717 (1961), that a general state warrant for the seizure of allegedly obscene material was illegal; and in *Mapp* v. *Ohio*, 367 U. S. 643 (1961), overruling its earlier decision to the contrary in *Wolf* v. *Colorado*, 338 U. S. 25 (1949), that material illegally seized by state officers was inadmissible even in a state court proceeding.

In *Ferguson* v. *Georgia*, 365 U. S. 570 (1961), this Court held that Georgia practice which allowed a criminal defendant to make an unsworn statement but denied him the aid of his counsel's questioning while making it, unconstitutionally deprived him of the effective assistance of coun-

sel. This case arose out of the fact that Georgia retained the old common-law rule that a defendant in a criminal case could not be sworn on his own behalf. Georgia was the only state to keep this old rule. Justices Frankfurter and Clark would have gone further than the rest of the Court: they would have held that this old rule, which Mr. Justice Clark characterized "as an unsatisfactory remnant of an age gone by", violated the Fourteenth Amendment's due process clause.

If the old common-law rule, centuries old, that a defendant in a criminal case could not be sworn on his own behalf, is now the basis for a violation of the Fourteenth Amendment's due process clause, then it is submitted that §764 of the New York Civil Practice Act, providing for body execution, as applied in the instant case simply to enforce the collection of a debt, likewise now violates this clause.

The New York Court of Appeals dismissed the appeal in the instant case "upon the ground that the order sought to be appealed from does not finally determine the action within the meaning of the constitution." But Mr. Justice Gellinoff's order, the one that the Appellate Division, First Department, affirmed without opinion, and the order which forms the basis for the instant petition, concluded:

> "ORDERED, that execution be issued herein against the person of Morris Gotthilf, defendant herein, without notice to the said defendant."

Surely the petitioner does not have to wait until he is in a debtors' prison, and then by writ of habeas corpus test the constitutionality of §764 of the New York Civil Practice Act, as applied in the instant case.

CONCLUSION

It is unbecoming a free people for a judge to be able to say to a defendant in a civil case, involving a civil debt, that the defendant either pay it all or go to jail. The instant petition for a writ of certiorari should be granted.

Respectfully submitted,

O. JOHN ROGGE
Attorney for Petitioner
60 Broad Street
New York 4, New York

APPENDIX I

Opinion by Mr. Justice Gellinoff at Special Term

[New York Law Journal—February 15, 1962]

Motion after judgment pursuant to section 764 of the Civil Practice Act for the issuance of a body execution against the individual defendant will be held in abeyance as indicated herein. Plaintiffs recovered a money judgment against both defendants and the judgment has been upheld on appeal to the Appellate Division. Plaintiffs are entitled to execution of judgment pursuant to section 504 of the Civil Practice Act. The judgment, having been entered on a cause of action for fraud and deceit—upon which plaintiffs could have availed themselves of the provisional remedy of arrest, pursuant to section 826(5) of the Civil Practice Act—execution against the person may now be granted thereon. Section 764 of the Civil Practice Act is constitutional. There is not a sufficient showing that plaintiffs have waived their right to a body execution by including a cause of action upon which a body execution allegedly could not have issued, or otherwise. All other points raised by defendant were, or should have been, raised and presumably were fully reviewed, on appeal. That possible defenses were lost through alleged inadvertence or alleged negligence on the part of former counsel, is a collateral matter, as to which defendant may seek redress, as he may be advised. Although he appeals to the discretion of the court, defendant has neglected to bare completely his present financial status and future prospects, and to present any plan for payment of the judgment. The defendant will be

granted an opportunity to do so by serving and filing an additional affidavit, as above indicated, on or before February 21, 1962. If no such affidavit is filed, or if the affidavit when filed does not appeal to the discretion of the court, the motion for the issuance of a body execution will be granted.

APPENDIX II

Opinion by Mr. Justice Gellinoff at Special Term

[New York Law Journal—March 14, 1962]

The defendant has not convinced the court of any meritorious ground for withholding the issuance of a body execution. Accordingly, the motion is granted. Submit order.

APPENDIX III

Order of Affirmance of Appellate Division, First Department

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 20th day of September, 1962.

Present:

HON. CHARLES D. BREITEL,
Justice Presiding,
" BENJAMIN J. RABIN,
" FRANCIS L. VALENTE,
" SAMUEL W. EAGER,
" ARON STEUER,
Justices.

4987

BENJAMIN SILLS, MORTON SILLS and SILLS OF CAMBRIDGE, INC.,

Plaintiffs-Respondents,

—v.—

CHARGE-IT SYSTEMS, INC.,

Defendant,

and

MORRIS GOTTHILF,

Defendant-Appellant.

Appendix III

Affirmance of Order

An appeal having been taken to this Court by the defendant-appellant from an order of the Supreme Court, New York County, entered on the 26th day of March, 1962, granting plaintiffs' motion for an order directing the issuance of an execution against the person of defendant-appellant, and said appeal having been argued by Mr. O. John Rogge of counsel for the appellant, and by Mr. Hyman Jacobs of counsel for the respondents; and due deliberation having been had thereon,

It is hereby unanimously ordered that the order so appealed from be and the same is hereby affirmed with $20 costs and disbursements to the respondents.

Enter:

Vincent A. Massi
Clerk